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In the Supreme Court of the United States

OCTOBER TERM, 1979

AL BUCCHINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
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Washington, D.C. 20530

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Petitioner contends that the district court erred in accepting his guilty plea without first explaining that a special parole term, if violated, could result in incarceration beyond the term of imprisonment originally imposed.

Following indictment in the United States District Court for the Southern District of Texas, petitioner pleaded guilty to one count of conspiracy to possess with intent to distribute and to distribute cocaine, in violation of 21 U.S.C. 846.[1] He was sentenced to 15 years'

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[1]Five counts of using a telephone to cause and facilitate a conspiracy to possess with intent to distribute and to distribute cocaine were dismissed upon acceptance of the plea.

imprisonment to be followed by a special parole term of five years and fined $25,000.[2] The court of appeals affirmed (Pet. App. 1a-5a; 606 F. 2d 590).

At the plea hearing, the district court advised petitioner that there was no mandatory minimum penalty for the crime with which he was charged and also described the maximum possible penalty for it, as required by Rule 11(c)(1) of the Federal Rules of Criminal Procedure (III-R. 6-7):

> The rule also requires that I advise you of the maximum possible penalty provided by law and the maximum possible penalty provided by law, that is, the worst that could happen to you if you were convicted or pleaded guilty, is 15 years imprisonment, a $25,000 fine and a special parole term of at least three years. Theoretically, the special parole term could be indefinite, could be for the rest of your life. Actually, I am advised by the probation office

[2]The question whether a special parole term may be imposed for the offense of conspiracy to possess or distribute narcotics, in violation of 21 U.S.C. 846, is currently before the Court in *Bifulco* v. *United States*, No. 79-5010 (argued Feb. 27, 1980). Petitioner has not raised that issue here, and, unless the Court deems the issue presented herein otherwise worthy of review, there is no reason for the Court to hold this case pending a decision in *Bifulco*. If the Court holds in *Bifulco* that a special parole term may not be imposed for a conspiracy conviction, petitioner can have his sentence corrected by filing a motion in the district court pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

On the other hand, were the Court inclined to grant review on the issue presented herein, it should hold the case for the decision in *Bifulco*, because, if the special parole term is held inapplicable to narcotics conspiracy convictions, petitioner would not have been even arguably misinformed about the length of the sentence that could accompany his conviction.

> that they really frown on special parole terms of much more than five years because they find it administratively difficult to handle parole terms much longer than that. So the absolute worst that could happen to you is 15 years imprisonment and $25,000 fine and theoretically a special parole term almost indefinite in length. So do you understand that's absolutely the worst that could happen to you?

Petitioner acknowledged that he understood this penalty. Neither petitioner nor his retained counsel asked the court to explain the special parole term further.

Petitioner now contends that the district court should have advised him that the special parole term, if violated, could result in a term of imprisonment beyond his 15-year sentence, with no credit for time served on parole prior to the violation. But Rule 11 contains no such requirement. The 1966 version of Rule 11 required trial courts to advise defendants of "the consequences of the plea." In 1975, Congress revised Rule 11 and in subsection (c)(1) specifically defined those consequences as "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law." This is the only explanation of sentencing required by the Rule. The Advisory Committee on the Criminal Rules made clear that it did not intend to require the district courts to elaborate further on the collateral consequences of sentences. See Notes of Advisory Committee on the Criminal Rules (1975 Amendments), 62 F.R.D. 271, 279 (1974). Thus, petitioner, who was advised by the district court that he was exposing himself to a maximum possible penalty of a $25,000 fine, 15 years' imprisonment, and a special parole term of life and who stated, in the presence of counsel, that he understood the sentence, was

entitled to nothing more. *United States* v. *Broussard*, 582 F. 2d 10, 12 (5th Cir. 1978), cert. denied, 440 U.S. 935 (1979); *United States* v. *Adams*, 566 F. 2d 962, 969 (5th Cir. 1978); *Johnson* v. *United States*, 539 F. 2d 1241, 1243 (9th Cir. 1976), cert. denied, 431 U.S. 918 (1977); *Michel* v. *United States*, 507 F. 2d 461, 464 (2d Cir. 1974); cf. *Sanchez* v. *United States*, 572 F. 2d 210 (9th Cir. 1977).

The decision below does not conflict with prior decisions of this Court or of the other courts of appeals. All of the cases concerning mandatory special parole terms on which petitioner relies involve claims of Rule 11 violations based on failure to provide information that *was provided* in the present case.[3] For example, *Moore* v. *United States*, 592 F. 2d 753 (4th Cir. 1979), on which petitioner primarily relies, was an appeal from a denial of

[3]Applicable mandatory special parole sentences were not even mentioned by the trial courts in *Bunker* v. *Wise*, 550 F. 2d 1155 (9th Cir. 1977), *United States ex rel. Baker* v. *Finkbeiner*, 551 F. 2d 180 (7th Cir. 1977), *Roberts* v. *United States*, 491 F. 2d 1236 (3d Cir. 1974), and *United States* v. *Watson*, 548 F. 2d 1058 (D.C. Cir. 1977). The defendants in *United States* v. *Del Prete*, 567 F. 2d 928 (9th Cir. 1978), and *United States* v. *Journet*, 544 F. 2d 633 (2d Cir. 1976), were not apprised of the potential length of the special parole term, as well as other information that they argued was required by Rule 11. The defendant in *United States* v. *Crusco*, 536 F. 2d 21 (3d Cir. 1976), had pleaded guilty in exchange for a maximum sentence of seven years and an assurance that he would be permitted to withdraw his plea if he received a sentence of more than seven years. The defendant was sentenced to six years' imprisonment and three years' special parole and immediately moved to withdraw his plea. Noting that "neither the Government nor the district judge specified that the maximum sentence of *confinement* would be seven years" (536 F. 2d at 24), the Third Circuit held that the defendant was entitled to withdraw his plea because he reasonably might have misunderstood the promised maximum sentence of seven years to include the three-year special parole term, rather than being in addition to it.

a 28 U.S.C. 2255 petition to vacate a sentence of 15 years' imprisonment and three years' special parole on the ground that the defendant had not understood the maximum penalty for the offense because it had not been explained to him. Although the trial court had advised Moore that the relevant criminal statute required a special parole term of at least three years, it had not advised him that there was no maximum on the special parole term.[4] Finding that there was "no evidence that Moore in fact understood the maximum penalty at the time he entered his plea" (592 F. 2d at 756), the Fourth Circuit remanded the case for reduction of the prison sentence to twelve years, so that the combined sentence of imprisonment and special parole would equal the 15-year maximum of which the defendant had been advised or, in the alternative, for setting aside the plea and permitting the defendant to plead again.[5] While we do not mean to imply agreement with the Fourth Circuit's holding that the failure to advise a defendant of the absence of a maximum on the mandatory special parole term constitutes a violation of

[4]The trial court advised Moore of the applicable penalties as follows:

> THE COURT: Well, under the law on which this first court [*sic*] is based . . . the possible maximum penalty is a fine of up to $25,000 or imprisonment for up to 15 years, and if any period of confinement is imposed, the law requires the imposition of a special parole term of at least three years. Do you understand that's the possible maximum penalty under the law in this case?
>
> DEFENDANT MOORE: Yes, sir.

595 F. 2d at 754.

[5]Accord, *United States* v. *Richardson*, 483 F. 2d 516 (8th Cir. 1973).

Rule 11, the facts of the present case, in which petitioner was advised clearly that "the worst that could happen" to him included a special parole term lasting for the rest of his life, are materially different.

Contrary to petitioner's suggestion (Pet. 17-18), this is not a suitable occasion for considering whether the holding of *United States* v. *Timmreck*, 441 U.S. 780 (1979), that not every technical violation of Rule 11 warrants relief on collateral attack should be applied to direct appeals as well, since there was no Rule 11 violation, technical or otherwise, in this case.[6]

[6]The courts of appeals are divided on the question whether every violation of Rule 11 requires automatic reversal on direct appeal. The Fifth, Eighth and Ninth Circuits have not adopted a standard of automatic reversal. See *United States* v. *Dayton*, 604 F. 2d 931 (5th Cir. 1979) (en banc), cert. denied, No. 79-944 (Feb. 25, 1980); *United States* v. *Cammisano*, 599 F. 2d 851, 855 (8th Cir. 1979); *United States* v. *Scharf*, 551 F. 2d 1124, 1129-1130 (8th Cir.), cert. denied, 434 U.S. 824 (1977); *United States* v. *Lambros*, 544 F. 2d 962 (8th Cir. 1976), cert. denied, 430 U.S. 930 (1977); *United States* v. *Conrad*, 598 F. 2d 506 (9th Cir. 1979). On the other hand, some circuits have imposed an "automatic reversal" rule. See *United States* v. *Gray*, 611 F. 2d 194 (7th Cir. 1979), cert denied, No. 79-6057 (Apr. 21, 1980); *United States* v. *Fels*, 599 F. 2d 142, 149 n.5 (7th Cir. 1979); *United States* v. *White*, 583 F. 2d 819, 824 (6th Cir. 1978); *United States* v. *Boone*, 543 F. 2d 1090, 1092 (4th Cir. 1976). The Second Circuit has taken conflicting positions on the issue. Compare *United States* v. *Michaelson*, 552 F. 2d 472 (2d Cir. 1977), and *United States* v. *Saft*, 558 F. 2d 1073 (2d Cir. 1977), with *United States* v. *Palter*, 575 F. 2d 1050 (2d Cir. 1978), and *United States* v. *Journet*, 544 F. 2d 633, 635 (2d Cir. 1976). The Third Circuit, sitting en banc, recently considered the issue, but was evenly divided and affirmed without opinion. *United States* v. *Altro*, No. 78-2386 (Nov. 14, 1979), cert. denied, No. 79-5892 (Mar. 17, 1980). Previously, the Third Circuit had followed the "automatic reversal" rule. See *United States* v. *Keller*, 594 F. 2d 939, 942 (3d Cir. 1979). But see *United States* v. *Dawkins*, 448 F. Supp. 1343 (E.D. Pa.), aff'd, 577 F. 2d 729 (3d Cir. 1978) (Table).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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